GAN TSIAN HUA

v.

PUBLIC PROSECUTOR

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CRIMINAL APPEAL NO. 44-7-91]
15 MARCH 1993

CRIMINAL PROCEDURE: Revisionary powers of High Court - CPC ss. 323, 325 - Juvenile ordered to be detained at Henry Gurney School by Magistrate - Bail allowed pending appeal - Application to extend time to file petition of appeal - Delay - Magistrate's order frustrated by juvenile coming of age - Whether a proper case for revision - Whether Magistrate's order thereof could be substituted.

CRIMINAL PROCEDURE: Bail - Accused on bail pending disposal of appeal - Petition of appeal not filed - Accused allowed to remain on bail - Whether proper.

On 31 July 1990, the juvenile accused was charged with two others with armed robbery under ss. 392 and 397 Penal Code read with s. 34 of the same Code. He pleaded guilty and consequently the Magistrate made an order under s. 40 Juveniles Court Act 1947 submitting the accused to detention at the Henry Gurney School until he attained the age of twenty one. The accused was then eighteen years of age.

The accused appealed against the order and applied for bail which the Magistrate granted. There was no petition of appeal filed and on 21 March 1991 the Magistrate notified the accused's Counsel that the appeal was deemed to have been withdrawn. A warrant of arrest was issued but beyond that no further action was taken by the Magistrate. The warrant was never executed.

On 11 April 1991 the accused filed a notice of motion in the High Court applying for an extension of time to file the petition of appeal. This application was heard on 15 February 1993, but on that date the accused withdrew the application and submitted himself to the aforesaid order of the Magistrate. By this time, however, the accused was already twenty years and nine months old.

The Deputy Public Prosecutor, sensing that there would be a substantial frustration of the Magistrate's order by virtue of the age of the accused, urged the Court to exercise its power of revision and substitute the Magistrate's order with that of an order of binding over under s. 294 CPC. The issue was whether under the circumstances of this case, it was competent and proper of the High Court to do so.

Held:

[1] As a matter of procedural propriety, no bail should be granted in such a case as this where there has been a failure by the accused to file his petition of appeal, unless and until the High Court has granted the extension of time.

[2] The Magistrate had failed to do what he ought to have done under the circumstances. Upon learning that the accused had failed to file his petition of appeal, what the Magistrate ought to have done was, instead of issuing a warrant of arrest, to issue a notice to the bailor to produce the accused. Such impropriety on the part of the Magistrate has contributed to the substantial frustration of the order that he himself had made on 31 July 1990.

[3] It is too late at this stage to rectify the mistake of the Magistrate. Nonetheless, in the circumtances of this case, bearing in mind the provisions of ss. 323(1) and 325(1) CPC, and bearing in mind too that what is now in issue is the propriety of the order of the Magistrate, it is still appropriate for this Court to exercise its power of revision under the aforesaid provisions of the CPC. It is hence ordered that the accused herein be bound over for a period of three years in the sum of RM 5000 in two sureties under s. 294 CPC.

[Magistrate's order substituted with order under s. 294 CPC].

Legislation referred to:
Criminal Procedure Code, ss. 173A, 294, 323(1), 325(1), (2)
Juveniles Court Act 1947, s. 40
Panel Code, ss. 34, 392, 397

For the applicant - P. Vasantha; M/s. Gulam & Wong
For the respondent - Yusof bin Zainal, DPP

JUDGMENT

Mohd Hishamudin Bin Mohd Yunus JC:
In this case, the applicant (hereinafter referred to as the "accused"), with two others who were juveniles, were charged before the

Magistrate Court, Rawang, on 31 July 1990 as follows:

> Bahawa kamu bersama-sama pada jam 1.45 pagi, 27 Mei 1990 di atas jalan raya di hadapan rumah Lot 200, Jalan Sekolah, Gombak Setia, dalam Daerah Gombak, Negeri Selangor Darul Ehsan, telah melakukan samun ke atas seorang pemandu teksi bernama Thai See Yin K.P. 5017279 (B) dengan bersenjatakan satu pisau dan merampas wang tunai sebanyak RM16 (enam belas ringgit). Oleh itu kamu bersama-sama melakukan satu kesalahan di bawah s. 392 dan 397 Kanun Keseksaan dan dibaca bersama di bawah s. 34 Kanun Keseksaan.

He pleaded guilty. At the time of the offence he was eighteen years old. In exercise of his powers under s. 40 of the Juveniles Court Act 1947, the learned Magistrate made an order that the accused be detained at the Henry Gurney School until he attains the age of 21. The accused appealed against the order and applied for bail pending the disposal of the appeal. Bail was granted.

On 19 February 1991 the Magistrate Court Rawang posted to the accused's Counsel the grounds of judgment. However, the accused failed to file his petition of appeal. Accordingly, the learned Magistrate by a letter dated 21 March 1991, notified the accused's Counsel that the appeal was deemed to have been withdrawn since no petition of appeal had been filed. A warrant of arrest was issued but there was nothing on record to show that the warrant was ever executed. Also, there was nothing on record to show what further action was taken by the Magistrate Court to enforce the order that was previously made on 31 July 1990. The accused it would appear had remained on bail, notwithstanding the fact that his appeal was deemed to have been withdrawn.

I am disappointed to note that the learned Magistrate had failed to do what he ought to have done under the circumstances. Upon learning that the accused had failed to file his petition of appeal, what the learned Magistrate ought to have done was, instead of issuing a warrant of arrest (which in any event was never executed!), to issue a notice to the bailor to produce the accused before the Magistrate Court so that the order that he had earlier made could be enforced. As a matter of procedural propriety, no bail should be granted in such a case as this where there has been a failure by an accused to file in his petition of appeal, unless and until the High Court has granted the extension of time.

Be that as it may, on 11 April 1991, the appellant filed a notice of motion in the High Court at Shah Alam applying for an extension of time to file the petition of appeal. After several postponements, the notice of motion was finally heard on 15 February 1993, that is to say, two and a half years after the date of the order made by the learned Magistrate. By this time, the accused was already approximately twenty years nine months old. At the commencement of the hearing, learned Counsel for the accused informed the Court that the accused wished to withdraw the application for extension of time. This was tantamount to submitting to the order of the Magistrate made on 31 July 1990. Accordingly, the application was struck off. Since in law there was no appeal pending, I had ordered that the order of the learned Magistrate be carried out forthwith.

Learned DPP then urged this Court to exercise its power of revision in view of the fact that since the accused would be attaining the age of 21 years in May 1993, a matter of just two months time, his detention at the Henry Gurney School would only be for that very short period. In other words because of the long delay in the disposal of the application, there has been a substantial frustration of the order made by the learned Magistrate.

I had adjourned the hearing of the learned DPP's application for revision to 23 February 1993, to enable both the learned DPP and learned defence Counsel to make further submissions regarding my powers of revision.

On 23 February, learned DPP again submitted that it is appropriate for me to exercise the power of revision given the peculiar circumstances of the case but was unable to cite any authority governing a situation similar to that of the present case. When asked by me as to what in his view should be the appropriate order or sentence that I should make taking into account the whole circumstances of the case, he suggested that the Court makes an order of binding over under s. 294 of the CPC.

Learned Counsel for the accused did not indicate any objection to the Court exercising its power of revision but, however, urged this Court to make an order of binding over under s. 173A of the CPC instead. She urged this

Court to take into consideration the fact that the accused was only 18 years old at the date of the commission of the offence, that at present the accused has a permanent job as a wireman, and that a binding over order under s. 294 of the CPC would be prejudicial to the accused since, unlike the order of the learned Magistrate, it carries a recorded conviction.

I shall now state my view. Section 323 (1) of the CPC states:

> 323 (1) A Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

Section 325 (1) of the CPC provides:

> 325 (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by s. 311, 315, 316 and 317 of this Code.

As I have pointed out earlier, it was irregular or improper that the accused was allowed by the learned Magistrate to remain on bail after he had failed to filed the petition of appeal. Such impropriety or irregularity on the part of the learned Magistrate has contributed to the substantial frustration of the order that he himself had made on 31 July 1990. However, it is too late at this stage for this Court to rectify that mistake.

Yet, be that as it may, I am of the view that under the circumstances of the case it is still appropriate that I exercise my powers of revision since, as I see it, what is now in issue is the propriety of the order of the learned Magistrate made on 31 July 1990 itself. An order made by a Court may be a legal and proper order at the time it was made, but it is possible for the order to cease to be a proper order as a result of a change of circumstances. Such is the position in the present case. It is now no longer disputed that the order of the learned Magistrate made on 31 July 1990, was a legal and proper order at the time it was made. However, due to a change of circumstances, that is to say, a change in the age of the accused, coupled with the failure on the part of the learned Magistrate to enforce his order when the accused failed to file his petition of appeal, that order made by the learned Magistrate, although still legal, nonetheless, has now ceased to be a proper order.

Having taken into account on the one hand such factors as the age of the accused at the time of the commission of the offence, the absence of any record of previous conviction, and the probation report; and on the other hand such factors as the seriousness of the offence, the role of the accused in the commission of the offence, and public interest since armed robbery is common nowadays, I am inclined to make an order of binding over under s. 294 of the CPC.

I am mindful of the requirements of s. 325 (2) of the CPC and the fact that the order that I am going to make will be prejudicial to the accused since it carries a recorded conviction, However, I believe the requirements of this provision have been complied with since at the last two hearing dates the accused had, through his Advocate, been given an opportunity of being heard.

Accordingly, in the exercise of my powers of revision, I set aside the order of the learned Magistrate and instead I order that the accused be bound over under s. 294 of the Criminal Procedure Code in the sum of RM5,000 with two sureties for a period of three years.